PATTON, BOGGS & BLOW

2550 M STREET, N.W.
WASHINGTON, D.C. 20037-1350
(202) 457-6000

TELECOPIER 457-6315
TRT TELEX: 197780

JAMES R. PATTON, JR
GEORGE BLOW
JOSEPH L. BRAND
THOMAS HALE BOGGS, JR.
TIMOTHY J. MAY
HARRY A. INMAN
ELLIOT H. COLE
J. GORDON ARBUCKLE
WILLIAM C. FOSTER
DAVID C. TODD
RICHARD A. EARLE
ERNEST S. CHRISTIAN, JR
ROBERT H. KOEHLER
DAVID B. ROBINSON
JOHN H. VOGEL
ALLAN ABBOT TUTTLE
BART S. FISHER
JOHN L. OBERDORFER

LANNY J. DAVIS
DOMENICO DE SOLE
TIMOTHY A. VANDERVER, JR.
JOHN F. WOODS
TIMOTHY A. CHORBA
RONALD H. BROWN
MIDDLETON A. MARTIN
GARRET G. RASMUSSEN
JAMES B. CHRISTIAN, JR.
DAVID E. DUNN
RONALD S. LIEBMAN
J. KIRK WADE
STUART M. PAPE
JOE ROBERT REEDER
STEVEN M. SCHNEEBAUM
CLIFF MASSA III
SHAOUL ASLAN
DONALD V. MOOREHEAD

250 WEST PRATT STREET
BALTIMORE, MARYLAND 21201
(301) 659-5600

104 NORTH ELM STREET
GREENSBORO, NORTH CAROLINA 27401
(919) 273-1733

700 RALEIGH FEDERAL SAVINGS
BANK BUILDING
RALEIGH, NORTH CAROLINA 27602
(919) 832-4111

101 EAST KENNEDY BOULEVARD
TAMPA, FLORIDA 33602
(813) 222-8888

FRANK R. SAMOLIS
DON A. ALLEN
RICHARD M. STOLBACH
KATHARINE R. BOYCE
GEORGE M. BORABABY
JEFFREY T. SMITH
GEORGE J. SCHUTZER
THOMAS H. CATALANO
SCOTT NASON STONE
THEODORE G. KRONMILLER
HARRY R. HUGHES*
JOHN A. MOAG, JR.*
MICHAEL D. ESCH
FLORENCE W. PRIOLEAU
JUDITH BARTNOFF
JOHN F. JONAS
C. ALLEN FOSTER*

RICHARD D. CONNER*
CHARLES B. ROBSON, JR.*
KENNETH J. GUMBINER*
ALLEN HOLT GWYN*
THOMAS J. POOLEY*
JAMES S. SCHENCK III*
ALAN M. RIFKIN*
DUANE A. SILER
ROBERT P. BRADY
ANDREW S. NEWMAN
RUSSELL V. RANDLE
JEAN V. MacHARG
DEAN M. DILLEY
DEBORAH F. NEIPRIS
JOHN C. MARTIN
DEBORAH M. LODGE
MITCHELL R. BERGER
DONALD H. PEARLMAN*

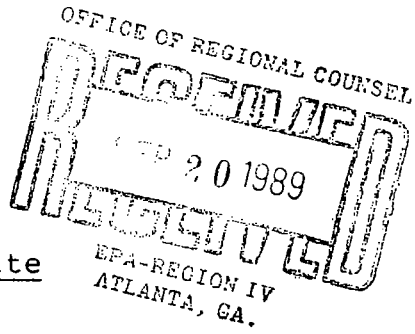
*Not admitted in D.C.

WRITER'S DIRECT DIAL
(202) 457-5282

September 18, 1989

VIA TELECOPY

Carol F. Baschon, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365



Re: Collierville Site

Dear Carol:

This letter is further to the meeting Thursday in Atlanta, attended by yourself and Felicia Barnett for EPA, and by Jess Walrath, Phil Coop, and myself on behalf of Carrier, as well as our call on Friday. In my view, the discussions were cordial and constructive. I think we can resolve the few remaining legal issues by phone and telecopy. I received your proposed new language on two provisions by telecopy on Friday.

My purpose in writing is to confirm the resolution we have reached on some of these provisions, as well as to identify those items we have yet to complete. Where we have agreed upon language, I have attached it for convenience sake.

1. Site Access.

The substitute language concerning site access has now been reviewed and found satisfactory by EPA. That language is attached as Section VII, ¶¶ G, H.

2. Force Majeure.

The proposed revision to the fifth sentence, concerning waiver, has now been reviewed and found satisfactory by EPA. That language, which will be in Section XIV, is attached.

3. Dispute Resolution.

We discussed the language suggested by Carrier, and agreed upon several changes to reflect EPA concerns and to conform the language with other portions of the order. This revised, agreed upon language is now Section IX, and is attached.

4. Exclusions from Administrative Record.

EPA has disagreed with our suggestion that it provide a written explanation if it excludes material Carrier offers from the administrative record, suggesting that such language is redundant with § 300.67(d) in the National Contingency Plan concerning public comment.

As we discussed, we have had a bad experience with at least one other EPA Region in excluding important technical material from the record, in order to prevent challenge to the remedy the Region preferred. Although that Region ultimately reversed its decision on remedy, that experience convinces us that it is important to avoid the possibility of unreasonable exclusions. We believe that EPA should at least explain its basis if it decides to exclude technical material offered by our client for the administrative record.

Although we were willing to drop the language that EPA not unreasonably exclude material, and simply to rely on language requiring EPA to explain such exclusion, we are concerned that the language in §300.67(d) does not adequately protect our client's interest, as it has not in the past. With reference to this particular site, we note that this regulation applies only to sites actually on the National Priorities List (NPL), which Collierville is not on. Thus, in the absence of language in the order, it is unclear if EPA has any formal obligation to explain its action in excluding material Carrier offers. Additionally, the language of §300.67 simply requires EPA to summarize "major issues raised by the public and how they are addressed." This language does not explicitly require EPA to explain its reasons for excluding material from the record, even if such language is held to be applicable to this site.

After you return, I would like to discuss that matter with you further, to see what language we can work out on this issue.

5. Indemnity.

Carrier has suggested a slight rewording in the indemnity provision, Section XV, paragraph A, which you are checking with one of your colleagues.

6. Stipulated Penalties.

After considerable discussion we agreed upon a revised stipulated penalty provision, which specifies the deliverables covered, and changes the time sequence slightly. Additionally, at EPA's request, a change is made in the reservation of rights section for the sake of clarity. Those changes are reflected in the attached language, which will be Section XVIII.

7. Reimbursement of Costs.

After lengthy discussion, we largely agreed on a reimbursement provision. We have one issue left to resolve, and that is whether Carrier's grounds for objection to costs should be specified and whether such grounds should include whether such costs were necessary.

EPA is concerned that such language might be the basis for Carrier to use to "nitpick" claimed oversight costs. We think that EPA is protected from such misuse of the provision because Carrier must make its case in dispute resolution to an EPA official who will be hostile to such "nitpicking" claims. In these circumstances, Carrier would have no incentive to pursue trivial issues.

Carrier, for its part, is quite concerned that oversight costs bear some reasonable relationship to the cost of the work overseen. In at least one site in Kentucky, the American Creosote site, it is our understanding that the oversight cost claim was $683,000 for a $500,000 RI/FS. In order to prevent possibly extravagant and unreasonable oversight cost claims from being successfully asserted by the oversight contractor, Carrier believes that specifying that such claims should be "necessary" will give the EPA official acting under the dispute resolution clause a clear basis to disallow oversight cost claims which that EPA official finds to be excessive or unreasonable in proportion to the work being undertaken by Carrier at this site.

Your revised draft, telecopied to me on Friday, takes an alternative approach of simply omitting the stated grounds for challenging oversight cost claims. When you return, I would like to discuss with you how you foresee this approach working.

8. Scheduling.

For institutional reasons, EPA believes it important to execute a consent order by the end of the month. As both sides recognize, EPA will not be ready to approve the draft work plan by then, and Carrier's contractor will need time to revise it to incorporate EPA's comments.

EPA has proposed, and Carrier is agreeable in concept to, the execution of a consent order providing for completion and approval of the work plan by a date certain. If agreement cannot be reached by that time, the order will be voidable at the option of either party. If no agreement can be reached by a set time after the deadline, then the order becomes null and void. If the order is voided by a party, or by operation of the terms of the order, then each party will, be restored to its prior position, e.g. without penalty to Carrier or waiver of rights by EPA.

In our discussions, it was suggested that November 30 be the target date for having an approved work plan, with 30 days subsequent period for voidability ending December 30. Thus on December 31 the order would become null and void unless a work plan had been approved, or unless the parties mutually agree to amend the order and extend such time.

You have telecopied your proposed language to me on this point, which I have sent to my client for its review as well. I have several questions about the draft which I would like to discuss, although the approach seems consistent in concept with what we discussed, if not in every detail.

9. Miscellaneous.

The provisions of section V, paragraphs A-J, should be revised to reflect the decision to incorporate the work plan by reference, together with the schedule there provided. We have sent you proposed language on this point, which Felicia indicated she would review to see if she saw any difficulties. As this language is largely mechanical, I hope that we can quickly agree on it. Please let me know when you call about any adjustments you think are necessary in this language.

Both you and I will need to review the other provisions of the order to assure that whatever mechanical changes are needed to accommodate the change in effective date now suggested by EPA are made before the final version is presented for execution by our respective clients.

Summary.

In my view the only remaining issues are the questions about the administrative record and reimbursement provisions, any response your colleagues have on the suggested change in the indemnity provision and Section V's revised language, and any additional comments my client may have about your proposed effective date provision.

Please call me Tuesday after you have had a chance to review this letter and attachment.

Sincerely,

Russell V. Randle
Counsel to Carrier Corporation

attachment to 9/18/89 ltr from Randle

MEMORANDUM

This memorandum sets forth language agreed upon for inclusion in the consent order for the Collierville site. The sequence of provisions corresponds to the letter dated September 18, 1989 from Russell V. Randle, representing Carrier, to Carol F. Baschon, representing EPA.

1. Site Access.

Insert the following language at the end of Section VII:

G. To the extent that the RI/FS involves activites that must be carried out on properties (other than the Facility) not owned by Respondent, Respondent shall use its best efforts to obtain access agreements from the property owners within thirty (30) calendar days of the identification of the access need. Best efforts as used in this paragraph shall include, at a minimum, a certifed letter from Respondent to the present owners of such property requesting access agreements to permit Respondent and EPA and its authorized representatives to have access to such property. In the event that such access agreements are not obtained within the time set forth in the Paragraph, Respondent shall notify EPA within five (5) working days of the receipt of denial of its request for off-site access. Respondent shall indicate both the lack of agreements and the level of effort made to obtain such access agreements. In such event, and if either party deems such agreement essential

to the satisfaction of the requirements of this Order, EPA may, in its discretion, take such action as it deems appropriate to secure such access agreement. If Respondent is unable to secure an access agreement in accordance with this paragraph, such event will constitute a Force Majeure with respect to the activities for which the property in question is necessary. In no event shall this paragraph apply to the Facility.

H. In the event EPA or its authorized representatives deem it necessary under this Order to take photographs at the facility, two day's advance notice shall be given Respondent for photographs taken outdoors at the facility, and ten day's advance notice shall be given for any photographs taken inside buildings at the facility. The purpose of such advance notice is to provide Respondent time to assure that:

(1) such photographic work does not violate any applicable national security requirements of any government contracts under which it may then be working;

(2) appropriate arrangements are made with EPA to protect any confidential commercial information disclosed in such photographs. Respondent believes that certain aspects of its assembly process may be unique in the industry, and regards such information as proprietary; and

(3) appropriate escorts are available for such photographic work.

2. Force Majeure.

Substitute the following sentence for the fifth sentence in Section XIV:

Failure of the Respondent to comply adequately with the notice requirements of this Section shall constitute a waiver of the right to invoke this Section for the particular circumstances for which notice was inadequate.

3. Dispute Resolution.

Substitute the following language for Section IX:

1. If Respondent disagrees, in whole or in part, with any EPA disapproval or other decision or directive made by EPA pursuant to this Order, Respondent shall notify EPA in writing via certified mail of its objections and the bases therefor within ten (10) calendar days of its receipt of EPA's disapproval, decision, or directive. EPA and Respondent shall then have an additional thirty (30) calendar days from EPA's receipt of Respondent's objections to attempt in good faith to resolve the dispute. If agreement is reached, the resolution shall be reduced to writing, signed by representatives of each party, and incorporated into this Order.

2. If the parties are unable to reach agreement within this 30-day period, EPA shall provide a written statement of its decision to Respondent. Such decision by EPA shall be made generally in accordance with the provisions of this Order, in particular in accordance with the reservation of rights provisions of this Order.

6. Stipulated Penalties.

Substitute the following language for Section XVIII:

Except for delays from events which constitute a force majeure, the Respondent will be subject to the imposition of stipulated penalties for failure to submit the draft or final RI Report, or draft or final FS Report, or any final treatability study Report, by the deadlines set forth in the approved RI/FS work plan, as such deadlines may subsequently be modified pursuant to this Order adn the work plan provisions it incorporates. These stipulated penalties are $1000 per day for the first 10 business days, $2000 per day for the next 20 business days, and $3000 per day for each business day beyond 30 business days. For the purpose of this provision, the submission date of documents is the date they are mailed or placed in the hands of an express service. Payment for any stipulated penalties accrued pursuant to this Consent Order will be sent to:

United States Environmental Protection Agency
Superfund Accounting
P.O. Box 100142
Atlanta, Georgia 30384

Attn: Collection Officer for Superfund

within 30 days of receipt by Respondent of EPA's written accounting of penalties. Payment, in the form of a check, will be sent by certified mail. A copy of the Respondent's transmittal letter referencing the Site will be sent simultaneously to the EPA Project Coordinator. EPA reserves the right to waive such penalties.

In the reservation of rights clause, subsitute the language, "statutory penalties under sections 106 and 109 of CERCLA" for the term "monetary penalties."